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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent, **A131513**

v. **(Contra Costa County Super. Ct. No. 51005339)**

TERRY BUTLER,

Defendant and Appellant.
_____/

The People charged appellant Terry Butler with second degree robbery of a 7-Eleven store in Antioch (Pen. Code, §§ 211, 212.5) and alleged various sentencing enhancements. After trial commenced, appellant moved to substitute counsel. The trial court held a *Marsden* hearing and denied the motion.[1] A jury convicted appellant of second degree robbery and found the enhancements true. The court sentenced appellant to state prison.

On appeal, appellant claims the court erred by denying his *Marsden* motion without making "sufficient inquiries into [his] complaints and communication problems" with trial counsel. We disagree and affirm.

[1] *People v. Marsden* (1970) 2 Cal.3d 118. Unless otherwise noted, all further statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

Trial began on January 20, 2011. On January 25, 2011 — after two witnesses testified — appellant made a *Marsden* motion. At the *Marsden* hearing, the court told appellant to "speak freely" and informed him it would "consider anything that you have to say in connection with your motion." In response, appellant claimed his attorney exhibited a "lack of concern" about the case because it had "been like eight, ten months" and his attorney had just "started to put in some effort." Appellant also said he had told his attorney about a potential witness eight months before trial, but his attorney had not contacted the witness until shortly before trial. Appellant explained he did not "feel comfortable" with counsel and opined, "[i]t ain't going to work." The court asked appellant, "Is there anything else that you want me to consider," and appellant replied, "No, not at all."

In response, counsel stated he received the case at the end of April 2010 and met with appellant on April 28, 2010. At the meeting, appellant told counsel "there were no witnesses." At that point, appellant interrupted, stating, "That's a lie. . . . That's a lie. . . . That is what I am talking about." The court directed appellant to refrain from interrupting counsel and assured appellant it would "hear anything" appellant wanted "to say" after counsel was done speaking.

Relying on his notes from his meeting with appellant on April 28, 2010, counsel reiterated that appellant told him that there were no witnesses. Counsel explained that he obtained a transcript of the appellant's police interview and a copy of the police reports. Counsel met with appellant again in June 2010 and discussed the police interview and fingerprint evidence. At the end of October 2010, appellant told counsel that he frequently walked along the trail outside of the 7-Eleven where the robbery occurred and that his girlfriend could "attest to that." Counsel informed the court that he spoke to appellant's girlfriend, Renee Sully, in early January 2011 after appellant gave him "new contact information for her[.]"

Counsel stated that on January 21, 2011 — after trial had begun — appellant told him for the first time "that Ms. Sully [was] his alibi for the offense." Counsel told the

court that he and his investigator spoke to Sully and learned she "had information relevant to the case, [but] would not give us that information unless we disclosed information about the [case] . . . that I believe was confidential with a strategy that I was going to use for Mr. Butler's defense." On January 24, 2011, counsel learned Sully had attended voir dire, but was unable to find her after voir dire was completed. Counsel called Sully but she did not return his call.

Counsel also noted that when he met with appellant on January 24, 2011, appellant "was very agitated, used a bit of profanity and then we ended the meeting." Counsel opined, however, that he could continue to represent appellant adequately and there was no impediment to communicating with appellant. He did note that "adequate discussions [with] Mr. Butler will require appropriate behavior on the part of Mr. Butler. So if he were to have discussions that continued the way they did last night . . . I would end those discussions[.]"

In response, appellant said: "First of all, I sit here lying, lying to your face about [how] he just found out he had a witness, and the day before I told him she would be in court. So he knew she was here, you know. . . . As far as me communicating with him, there will be no more conversations with him for my sake. He ain't here. That is how I feel. I am not conversating with him about nothing. Ain't going to be none of that. [¶] Nothing else to talk about. [¶] I mean . . . enough is enough. He['s] been playing with me all of the time." Counsel responded by opining that appellant's reaction was "largely a function of his predicament[,]" which prompted appellant to interrupt and say, "You don't know me." Appellant denied that he was acting a certain way because of "his predicament."

At that point, the court denied the *Marsden* motion. It explained it had observed the "conduct in the case . . . and [defense counsel]'s representation" and had credited counsel's description of his representation of appellant. The court determined counsel was "an extremely well-qualified attorney" who was capable of representing appellant effectively if appellant allowed him to do so. The court also concluded counsel had "made reasonable efforts" to speak with Sully and had appropriately determined there

were "difficulties" with obtaining her testimony. The court advised appellant it would be to his detriment if he ceased communicating with counsel. In response, appellant told the court he had "heard enough . . . we are not on the same team anyway. I have had enough. Get me out of here. I ain't got to sit here and listen to him [the judge] or [defense counsel.] I really don't." Appellant then asked to be removed from the courtroom.

The court recessed to allow appellant to calm down and think about his decision. After the recess, the court reiterated its denial of appellant's *Marsden* motion and expressed its hope that appellant would work with counsel for appellant's "best interests." The parties discussed various legal issues and defense counsel explained he had advised appellant "not to speak or address the Court without consulting [him] first." The court told appellant he could hurt his case "by just saying whatever is coming into [his] mind." In response, appellant indicated he would "like to waive [his] presence at this trial right now, at this time. . . . I would like not to be sitting next to this gentleman." The court cautioned appellant that it was not "wise or appropriate" for him to be absent and explained why. Counsel also indicated his "preference would be that Mr. Butler remains" at trial and noted it "would adversely affect . . . the outcome of his case if . . . we were to proceed in his absence." The prosecutor agreed.

Appellant then said, "He is not even helping me. . . . [H]e hasn't been helping me the last ten months. I told you that." As the court urged appellant to "remain with us," appellant interrupted, telling the judge that the judge's comments "don't mean nothing to me," "[t]his ain't your life," and "I don't give a damn about you." Appellant exclaimed, "You don't know what I have been going through with him the last ten months" and directed, "[g]et me out of here. I'm not going to sit here with this dude. [¶] If they got to bounce me off the freaking wall, that is what it is going to be. I am prepared for that."

The court ultimately agreed to appellant's request to be removed from the courtroom. Defense counsel then requested a mistrial. The court denied the request, in part because doing so "would give every defendant a veto power over his trial and we could never complete a trial if a defendant chose to do that." The court instructed the jury that appellant had chosen to "absent himself from the courtroom" and that his

absence was not evidence. Although appellant declined two opportunities to rejoin the trial he later informed the court he intended to testify and did not wish to consult his attorney about his testimony.[2] Appellant later testified on his own behalf; defense counsel questioned him.

The jury convicted appellant of second degree robbery (§§ 211, 212.5) and found the enhancements true. The court sentenced appellant to state prison.

DISCUSSION

Standard of Review

"When a defendant seeks new counsel on the basis that his appointed counsel is providing inadequate representation—i.e., makes what is commonly called a *Marsden* motion [citation]—the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance. A defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. Substitution of counsel lies within the court's discretion. The court does not abuse its discretion in denying the motion unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel. [Citation.]" (*People v. Smith* (2003) 30 Cal.4th 581, 604; *People v. Gutierrez* (2009) 45 Cal.4th 789, 803; *People v. Taylor* (2010) 48 Cal.4th 574, 599.)

The Court Did Not Abuse Its Discretion by Denying Appellant's Marsden Motion

Appellant's sole contention on appeal is the court erred by denying his *Marsden* motion without inquiring about defense counsel's "misrepresentations, and their difficulty in communicating." Specifically, appellant contends the court failed to make a "further inquiry of counsel" regarding appellant's claim that defense counsel "twice misrepresented the facts" regarding Sully.

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[2] On the way out of the courtroom, the judge overheard appellant tell defense counsel, "I don't think you and I will be catching another case" and "something about I'll strangle his ass[.]"

We reject appellant's contention that the court failed to inquire about the basis for his *Marsden* motion. At the outset of the *Marsden* hearing, the court offered appellant an opportunity to relate his complaints about defense counsel. Appellant complained that his attorney exhibited a "lack of concern" about the case, particularly because counsel had failed to contact a potential witness, Sully, until shortly before trial. Appellant explained he did not "feel comfortable" with counsel and claimed, "[i]t ain't going to work." When the court asked appellant, "Is there anything else that you want me to consider," appellant replied, "No, not at all." The court then invited defense counsel to comment. Counsel disagreed with appellant's characterization about his lack of effort on the case and described what he had done to prepare for trial; he also explained his attempts to contact Sully and to obtain her testimony. Although counsel noted some difficulty communicating with appellant because of his penchant for profanity, counsel "never wavered from his belief that [appellant] could benefit from his representation and that the attorney-client relationship had not deteriorated to a degree that would warrant substitution of counsel." (*People v. Hart* (1999) 20 Cal.4th 546, 604.) The court gave appellant an opportunity to respond to defense counsel's comments. Appellant became increasingly agitated and threatened to stop communicating with counsel. He did not, however, identify any specific concerns about counsel's performance.

The court complied with its duty to allow appellant to state reasons for requesting a substitution of counsel. (*People v. Smith* (1993) 6 Cal.4th 684, 691; 5 Witkin, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 159, p. 251.) "'To the extent there was a credibility question between [appellant] and counsel . . . the court was "entitled to accept counsel's explanation." [Citation.]'" (*People v. Jones* (2003) 29 Cal.4th 1229, 1245.) Moreover, it is clear from the record that the court provided appellant with "repeated opportunities to voice his concerns, and upon considering those concerns reasonably found them to be insufficient to warrant relieving trial counsel. We therefore find no basis for concluding that the trial court . . . failed to conduct a proper *Marsden* inquiry. . . ." (*Hart, supra,* 20 Cal.4th at p. 604.)

People v. Valdez (2004) 32 Cal.4th 73, is instructive. There, the California Supreme Court rejected the defendant's claim that the trial court "conducted a 'feeble and incomplete inquiry'" at a *Marsden* hearing. (*Id.* at p. 95.) The *Valdez* court explained, "[t]he record demonstrates that the court provided defendant with ample opportunity to detail his concerns and state the grounds for his motion. After hearing defendant's complaints, the trial court allowed counsel to respond. Trial counsel addressed defendant's specific concerns by describing what he had done in the case and what he planned to do. Although counsel did not agree with all of defendant's suggestions, he maintained that he was prepared to go to trial and would be able to work with defendant to address his concerns. As we have said, 'When a defendant chooses to be represented by professional counsel, that counsel is "captain of the ship" and can make all but a few fundamental decisions for the defendant.' [Citation.]" (*Id.* at pp. 95-96.)

The California Supreme Court continued, "[i]t is clear from the record that the trial court conducted a sufficient inquiry during both of the pretrial *Marsden* hearings. [Citation.] As we have said, 'a *Marsden* hearing is not a full-blown adversarial proceeding, but an informal hearing in which the court ascertains the nature of the defendant's allegations regarding the defects in counsel's representation and decides whether the allegations have sufficient substance to warrant counsel's replacement.' [Citation.]" (*Valdez, supra*, 32 Cal.4th at p. 96.)

Here as in *Valdez*, the court gave appellant an opportunity to air his concerns and respond to defense counsel's comments. The court concluded appellant's unhappiness with counsel was not based upon his "competence as an attorney." This conclusion was not an abuse of discretion. (*People v. Leonard* (2000) 78 Cal.App.4th 776, 787; see also *Gutierrez, supra*, 45 Cal.4th at p. 802 [court made adequate inquiry by listening to defendant's reasons for the request to substitute counsel, asking counsel to respond, and giving defendant an opportunity to reply].)

Appellant takes issue with comments defense counsel made during the *Marsden* hearing that appellant would react to "'any attorney'" with distrust and hostility because of his "'predicament.'" Relying on *Ferguson v. Mississippi* (1987) 507 So.2d 94, 97

(*Ferguson*), appellant suggests counsel's "insult" created an irreconcilable conflict. There are several problems with this argument. First, the mere fact that counsel's comments angered appellant does not create a ground for substitution where counsel stated he could adequately represent appellant. Second, *Ferguson* is distinguishable. In that case, the Mississippi Supreme Court concluded defense counsel's denunciation of the defendant as a liar in front of the jury deprived the defendant of a fair trial. (*Id.* at p. 97.) Here, defense counsel did not call appellant a liar and the comments he did make were not in front of the trier of fact. Third, we are not bound by out-of-state authority. (*Amerigraphics, Inc. v. Mercury Casualty Co.* (2010) 182 Cal.App.4th 1538, 1553.) That appellant declined to attend the trial after the court denied his *Marsden* motion does not alter our conclusion. As appellant concedes, he "behaved badly" by failing to attend the remainder of the trial. (See, e.g., *People v. Hardy* (1992) 2 Cal.4th 86, 138.)

Appellant's complaints that defense counsel did not adequately prepare for trial and did not interview a defense witness in a timely fashion are disagreements over trial tactics. And as appellant concedes, disagreements over trial tactics do not warrant a substitution of counsel under *Marsden*. (*People v. Welch* (1999) 20 Cal.4th 701, 728-729, overruled on another point in *People v. Blakeley* (2000) 23 Cal.4th 82, 91; *People v. Williams* (1970) 2 Cal.3d 894, 905; 5 Witkin, Cal. Criminal Law, *supra*, § 159, p. 250.) As our high court has explained, "[a] defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense. [Citation.] Tactical disagreements between the defendant and his attorney do not by themselves constitute an 'irreconcilable conflict.'" (*Welch*, *supra*, 20 Cal.4th at pp. 728-729; *People v. Lucky* (1988) 45 Cal.3d 259, 281-282.) Numerous courts have upheld the denial of a *Marsden* motion where the defendant and appointed counsel disagree about how the case should be tried. (See *People v. Carr* (1972) 8 Cal.3d 287, 299; *People v. Hisquierdo* (1975) 45 Cal.App.3d 397, 403; *People v. Rhines* (1982) 131 Cal.App.3d 498, 505.)

DISPOSITION

The judgment is affirmed.

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Jones, P.J.

We concur:

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Simons, J.

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Bruiniers, J.